84-1286

Case Number _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CHARLES W. CROSSON, JR.,
Petitioner

VS

WENDELL F. CONLEE,

EXECUTOR OF THE ESTATE
OF
E. DOUGLAS VIA, deceased,
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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February, 1985

QUESTION PRESENTED

Whether a Virginia judgment, proper in all respects, against a Florida Executor may properly be reversed, and the exercise of federal jurisdiction over the claim denied because Florida laws may protect the probate estate from enforcement of the judgment in Florida?

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles W. Crosson, Jr., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 4, 1984.

OPINIONS BELOW

The unreported Memorandum Opinion and Order of the United States District Court for the Western District of Virginia, which was entered on September 27, 1983, is attached to the Petition as Appendix B. The opinion of the United States Court of Appeals for the Fourth Circuit, attached as Appendix A, is reported at 745 F.2d 896 (1984) No. 83-2035 (4th Cir., decided October 4, 1984).

JURISDICTION

The original judgment of the Fourth Circuit was entered on October 4, 1984. Timely petitions for rehearing and suggestions for rehearing en banc were filed on October 17, 1984 and denied by the Fourth Circuit in an Order dated November 8, 1984. (Copy of Order

attached as Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

This is an action brought by Charles W. Crosson, Jr., a Virginia resident, against Wendell F. Conlee, Executor of the Estate of E. Douglas Via, deceased, a resident of Florida, pursuant to 28 U.S.C. §1332 (a) (1).

Charles W. Crosson, Jr., was employed by the Defendant's decedent on or about September, 1978 as a manufacturers' representative for the Defendant decedent's organization, a sole proprietorship located in Roanoke, Virginia. As a condition and inducement for Plaintiff's acceptance of the employment, E. Douglas Via promised that the obligations and benefits of the business would be assumed by the Plaintiff after

December, 1980. Throughout 1979 and 1980 the business was almost singularly carried on by the Plaintiff since the Defendant's decedent had moved to Florida, with only occassional visits to Roanoke. At the end of 1980, Plaintiff sought assurance from E. Douglas Via that control of the business would transter pursuant to their contract which had been entered into and performed in Virginia. E. Douglas Via did not respond, except to refuse acknowledgement of the previous contract for assumption of the business by the Plaintiff.

E. Douglas Via died on May 5, 1982, in Florida where he then resided. The Defendant duly qualified as the Executor of Via's estate on May 28, 1982. The Plaintiff's complaint was filed on July 2, 1982, in the United States District Court for the Western District of

Virginia against the Defendant in his capacity as the personal representative of E. Douglas Via, deceased.

The Defendant, through counsel, filed his Motion to Dismiss and Answer on July 29, 1982. Other than a general denial, the Defendant pled "the applicable statute of limitations" in response. However, he did not raise the nonclaim statute of Florida as an affirmative defense. The Defendant did raise the issue of failure to comply with the Florida nonclaim statute in a summary judgment motion in December, 1982[1]. In

---

[1]Section 733.702, Florida statutes 1982, provides, in part as follows:

> No claim or demand against the Decedent's estate, that arose before the death of the Decedent, shall be binding on the estate unless a claim therefor is filed in the Probate Court within three months from the time of the first publication of the Notice of Administration.

essence, the Defendant contended that the Plaintiff was precluded from pursuit and attaining a judgment in a Federal District Court in Virginia, applying Virginia law, in that he had failed to comply with a Florida probate statute.

THE RULINGS BELOW

In trial, before a jury, in the United States District Court for the Western District of Virginia held on February 24 and 25, 1983, a verdict was returned in favor of the Plaintiff. In an opinion (Appendix B) by the Honorable Jackson F. Kiser, the Defendant's Motion for Judgment notwithstanding the Verdict was overruled and judgment on the verdict was entered on September 27, 1983. Judge Kiser ruled that Virginia law controlled in the case before the bar and that the Florida nonclaim statute was a statute of limitations, not to be given

extraterritorial effect in Virginia. Additionally, the Court felt that the Defendant would be barred from raising a defense of the nonclaim statute on a waiver/estoppel theory. (Appendix B at B-10) The Court of Appeals disagreed. The United States Court of Appeals for the Fourth Circuit reversed the decision of the Federal District Court and remanded with directions. The ruling by the Court of Appeals, after supplemental briefs by the parties, found existence of jurisdiction over the subject matter not wanting. However, the Court announced that although the federal district court in Virginia had jurisdiction over the controversy and subject matter, it should have declined jurisdiction under the principle that: "a State will not exercise judicial jurisdiction if it cannot provide appropriate relief." Restatement (2nd) of Conflicts of Laws §85 (1971).

REASONS FOR GRANTING THE WRIT

1

Certiorari Should Be Granted to Resolve Conflicts Among the Lower Courts.

Virginia, being both the situs of the contract action and the forum state, is not barred from maintenance of the present action since no extraterritorial effect is to be given the Florida nonclaim statute. While stating "[W]e are not granting the Florida statute any extraterritorial application in Virginia, but only recognizing the effect that statute will have on enforcement of this claim", Crosson v. Conlee 745 F2d 896, 903, (1984), the Court of Appeals misapprehends its application. By refusing to grant recognition of the Florida nonclaim statute the natural consequence would be to let stand the judgment of Virginia. However, by mere

announcement that extraterritorial effect is not relevant to its consideration, the Court of Appeals has avoided deciding in favor of the Plaintiff on principles previously announced.

In Propst v. Fisher, 313 F2d 248 (6th Cir. 1963), the Court of Appeals was faced with an identical situation. "The sole question in this appeal is whether the failure of the Plaintiffs to comply with an Indiana statute requiring the filing of their claims against a Decedent's estate in the Probate Court barred them from maintaining the present actions for wrongful death against the Administrator of the Indiana decedent in the United States District Court in Michigan where the accident occurred and the Plaintiffs and their Decedent's resided." Id, p. 245, 249. The Court in holding that the claims were not barred

went on to say: "We are not concerned at this time as to how or in what manner Plaintiffs can satisfy their judgments if they obtained them. We think it will be time enough to determine the force and effect of the Indiana nonclaim statute whenever Plaintiffs seek to satisfy their claims out of assets of the Decedent's estate within the jurisdiction of the Indiana Courts." Id. p. 249, 250. The only distinction between the case cited and the one at bar is that the former grew out of tort and the latter contract. The United States Court of Appeals for the Fourth Circuit states that cases such as Propst "typically involved claims which might be satified through insurance. . . at or through assets located in the forum state. . . ." Crosson, 745 F2d 896, 903, (1984). However, nowhere in Propst was this

interpretation announced. The Court in Propst made no distinction as to where assets were to be found. Indeed, the only reference to insurance was to note that the defense was handled by the insurance carrier. "We do not base our decision in this case upon the availability of the liability insurance to protect the estate against loss. The cases heretofore cited from other jurisdictions, based upon a similar question, did not rely upon the availability of insurance." Brooks v. National Bank of Topeka, 251 F2nd 37 (8th Cir. 1958) In addressing the issue of enforceability, the Court noted that "[i]f the Plaintiff should hereafter assert any rights against the Kansas estate, it will be for the Kansas court to determine the effect it will give the Kansas nonclaim statute." Id, at 44.

In citing the case of Markham v. Allen, 326 U.S. 490, 66 S. Ct. 296, 90 L Ed. 256 (1946), the Court of Appeals sought to bolster its argument. However, upon a closer reading of the case, it is announced therein that a federal court "may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." Id, at 494.

In arriving at a decision based on the principle that the court cannot provide relief, the Court of Appeals has ignored the cases cited above. In each, the courts were not concerned with the ability of the plaintiffs to satisfy their judgments since that was not an

issue. In the case of Crosson, at no time was an issue of enforceability raised. At no time was the issue addressed by counsel, as was the issue of jurisdiction requested by the Court of Appeals in a supplemental brief by the parties.

II

The Court's Reliance on Restatement (Second) of Conflict of Laws §85 (1971) is Misapprehended.

A thorough reading of Comments a and b which expound on the above cited principle of law reveals a concern by a state to "entertain suit on a foreign cause of action if it feels that it cannot do justice to the parties by reason of its inability to provide appropriate relief." Id, 256. In the instant case, we are dealing with a local cause of action. A contract was entered into and performed

in Virginia while both parties were subject to its laws and jurisdiction. Plaintiff would be thoroughly inconvenienced and, perhaps, without requisites for suit, were he required to bring this action in the State of Florida. To announce, as did the Court of Appeals, that the Plaintiff would be unable to reach assets in Florida because of the nonclaim statute is without support. No consideration has been given and no circumstance addressed in this case which lays foundation for the court's opinion. The Court of Appeals has assumed facts and law, not before it, nor fully developed, in order to reach a decision that is contrary to that of the other circuits.

Indeed, the court's decision is tantamount to requiring a Plaintiff to prove, as a prerequisite to the obtaining

of a valid judgment, that there are assets from which to satisfy the judgment. This writer is unaware of any such requirement in American jurisprudence.

III

The Florida Nonclaim Statute Works a Harsh, Unfair and Unjust Result When the Spirit of Its Pronouncement Has Been Met.

Although the Plaintiff did not strictly comply with the requisites set forth by the Florida nonclaim statute, his Complaint, filed and served on the executor of Via's estate, contained all information dealing with Crosson's claim against Via. It was, perhaps, more detailed and informative than a claim ordinarily lodged with an Executor. Mr. Conlee was in the same position vis-a-vis, Crosson's complaint as he would have

been had a claim been filed. The Complaint was filed and served within the three-month period called for by the applicable statute. The Court of Appeals suggests that the decision of the District Court threatens "to needlessly deter a prudent executor from final disposition of the estate." Crosson, 745 F2d 896, 903. Yet, all of the pleadings filed and evidence taken indicate that the Plaintiff, except for filing a complaint in lieu of filing a claim, complied in spirit and purpose to satisfy the requirement of allowing an orderly disposition of the estate. There was no evidence offered or suggested that administration of the estate was concluded and would, thus, work an injustice or hardship on other creditors, or heirs, if any. Indeed, the only claim filed within the three-month period against the estate

of E. Douglas Via was by Toale Brothers Funeral Home in the amount of $813.04. (Appendix D)

Clearly, given all the potential stumbling blocks in the way of successfully concluding a right and just claim against a party who contracted in Virginia for the services of Charles W. Crósson, Jr., it would be contrary to justice, common sense, and fair play to deny a judgment on the merits to Charles W. Crosson, Jr., who, by filing a Complaint as opposed to a "claim" against the personal representative of E. Douglas Via, has met what requirement was sought by the statute of Florida.

CONCLUSION

WHEREFORE, your Petitioner, Charles W. Crosson, Jr., respectfully prays that a Writ of Certiorari be granted. Should this Court decline to grant this petition for a writ of certiorari on the issue of conflict in decisions in the lower courts, Petitioner respectfully urges that the Court correct the clear injustice caused by the Fourth Circuit's irregular and erroneous proceeding in this case. Petitioner specifically urges that this Court summarily grant this petition for writ of certiorari without requiring further briefing and reverse and remand the decision of the Fourth Circuit for modifications so that the Petitioner is awarded the full amount of his adjudicated damages.

Respectfully submitted,

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February, 1985

Case Number _____

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APPENDICES A, B, C, D

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February, 1985

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2035

Charles W. Crosson, Jr., Appellee,

-versus-

Wendell F. Conlee, the Executor of the Estate of E. Douglas Via, Deceased, Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, District Judge. (C/A 82-0462-R)

Argued: May 10, 1984.
Decided: October 4, 1984

Before RUSSELL and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

William B. Hopkins, Jr. (P. Brent Brown, Martin, Hopkins, Lemon and Carter, P.C. on brief) for Appellant; Robert F. Rider for Appellee.

RUSSELL, CIRCUIT JUDGE:

This action is brought by Charles W. Crosson, Jr., plaintiff/appellee, against Wendell F. Conlee, the executor of the estate of E. Douglas Via, defendant/appellant, alleging breach of a contract of employment entered into by Crosson and Via. Subject matter jurisdiction rests on diversity of citizenship, 28 U.S.C. § 1332(a)(1), plaintiff Crosson being a resident of Virginia, while defendant Conlee is a Florida attorney appointed under Florida law as personal representative for E. Douglas Via, a resident of Florida at the time of his death. The principal issues before us are, first, whether the federal district court in Virginia had personal jurisdiction over defendant where no property of the estate of the decedent was located in Virginia, and second, whether plaintiff's claim against the executor is barred due to

noncompliance with Florida's nonclaim statute, not having been presented to the Florida probate court within three months of the first publication of notice of administration. The case was tried before a jury, which rendered a verdict for plaintiff in the amount of $20,296.46. Defendant moved for judgment n.o.v., which the district court denied, entering judgment on the verdict. Defendant appeals, and we reverse.

I

The pertinent facts are not subject to dispute. Plaintiff's complaint alleged that he was employed in September 1978 as a manufacturer's representative for Via's business, a sole proprietorship located in Roanoke, Virginia, A condition of plaintiff's acceptance of employment was that Via would retire from the business at the close of 1980, and

plaintiff would then assume control. During 1979 and 1980 the business was effectively carried on by plaintiff, Via having moved from Virginia to Florida, making only occasional visits to Roanoke. Via refused to honor his agreement to retire at the end of 1980, and also withheld commissions due to plaintiff in 1981 under the terms of his contract of employment. Plaintiff has asserted without contest that the contract was entered into in Virginia.

Via died on May 5, 1982 in the State of Florida, where he was then a resident and domiciled. All of Via's property, real and personal, was located in Florida at the time of his death and remains there. Defendant qualified as the personal representative of Via's estate in the Probate Division of the Circuit Court for Sarasota County, Florida on May 28,

1982. Notice of administration of the estate was first published on May 31. Plaintiff filed his complaint in the United States District Court for the Western District of Virginia against defendant in his capacity as executor on July 2, 1982, but failed to file any claims with the Probate Court in Florida within three months of the publication of notice of administration.

Defendant generally pled the "applicable statute of limitations" as a bar in his answer of July 29, 1982, but did not specifically raise the issue of the nonclaim statute until he moved for summary judgment in December 1982, after the three-month period had elapsed.

II

Personal jurisdiction over defendant is asserted on the basis of the Virginia long-arm statute, Va. Code, §§ 8.01-328

to 330, and Fed. R. Civ. P. 4(d)(7) and 4(e), which authorize extraterritorial service of process in accordance with the laws of the state in which the district court is held. Va. Code § 8.01-328.1 (A)(1) confers personal jurisdiction on the Virginia courts as to a cause of action arising from a "person's . . . [t]ransacting any business in this Commonwealth." The statute expressly defines "person" to include "an individual, his executor, administrator, or other personal representative," Va. Code § 8.01-328, thereby bringing defendant within its ambit.

This jurisdictional question is complicated, however, by the old Virginia common law rule that an executor or administrator is not subject to suit in a state other than that of his appointment, unless he brings into or collects from

the state assets of the decedent's estate. Sylvania Industrial Corp. v. Lilienfeld's Estate, 132 F.2d 887, 890 (4th Cir. 1943); Fugate v. Moore, 86 Va. 1045, 11 S.E. 1063 (1890). In Sylvania, we recognized that Virginia law is controlling on whether a foreign executor is subject to suit in a federal court in Virginia, 132 F.2d at 890, and applied the rule of Fugate in holding that the defendant, a foreign executrix, could be sued in federal court there because Virginia was the situs of corporate stock belonging to the estate. Id. at 891. Here, however, no assets of the estate of Via are found in Virginia, so that the exception to the prohibition against suing a foreign executor in Fugate and Sylvania cannot be met. The issue, then, is whether the common law prohibition against such a suit as this has been

removed by the enactment of the Virginia long-arm statute in 1964.

Sylvania explained the Virginia rule thus:

> "The reason that a foreign executor is not ordinarily subject to suit is that a grant of administration has no legal operation outside the state from whose jurisdiction it is derived. [citation omitted] The exception recognized by the Virginia decisions is based upon the right of the state to protect local creditors with respect to the property of the decedent found or brought within the state. As to such property, the power of the state can be asserted without regard to the powers granted the executor by the foreign state."

132 F. 2d at 891. Likewise, the comments to Restatement (Second) of Conflict of Laws § 358 (1971) indicate that the judicial reluctance to entertain suits against foreign executors is not necessarily due to a want of jurisdiction, but because "the courts have deemed themselves incompetent to entertain the suit in the absence of statute," since a

foreign executor holds the assets of the estate subject to the direction of the appointing court. Comment b. The rule permitting suit against a foreign executor where assets lie within the forum state is predicated on the state's in rem jurisdiction over property within its own territory. Comment c.

Sylvania was decided two years before the revolution in personal jurisdiction wrought by the Supreme Court's enunciation of the "minimum contacts" due process doctrine in International Shoe Co. v. Washington. 326 U.S. 310, 316 (1945). A suit such as that before us falls within the permissible limits of due process, being "based on a contract which had substantial connections with" the forum state, Virginia. McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). We conclude that

the facts of this case also come within the "transacting business" clause of the Virginia long-arm statute. There can be no doubt that personal jurisdiction could have been obtained over Via during his lifetime, as he had operated a business in Virginia and entered into a contract with plaintiff concerning that business in Virginia. As the Virginia Supreme Court and this Circuit have repeatedly held, the long-arm statute represents a deliberate and conscious effort by the Virginia legislature to assert jurisdiction over nonresident defendants to the extent permitted by due process. Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1301 (4th Cir. 1983); Peanut Corp. of America v. Hollywood Brands, Inc., 696 F.2d 311, 313 (4th Cir. 1982); John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 180 S.E.2d 664, 667

(1971); Carmichael v. Snyder, 209 Va. 451, 164 S.E. 2d 703, 707 (1968). The Virginia Supreme Court has not yet addressed the issue before us, but we are convinced that it would recognize, as we do now, that the enactment of the Virginia long-arm statute in 1964, over two decades after Sylvania, considerably broadened the scope of personal jurisdiction in Virginia and superseded the rule of Fugate and Sylvania.[1] That common law doctrine, with its focus on the location of property, was more suited to the narrow concept of personal jurisdiction embodied in Pennoyer v. Neff, 95 U.S. 714 (1877). By defining persons subject to the statute to include an executor, the legislature necessarily rejected the

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[1] Even after International Shoe, the common law rule as expressed in Sylvania remained in force in jurisdictions that had not yet expanded personal jurisdiction by statute. See, e.g. Callwood v. Virgin Islands National Bank, 221 F.2d 770, 778 (3d Cir. 1955) (Virgin Islands).

possibility that personal jurisdiction might disappear with the fortuitous death of an individual defendant.[2] A finding of personal jurisdiction here is in accord with the rule expressed in Restatement (Second) of Conflict of Laws § 358 (hereinafter Restatement):

> "An action may be maintained against a foreign executor or administrator upon a claim against the decedent when the local law of the forum authorizes suit in the state against the executor or administrator and
>
> > "(a) suit could have been maintained within the state against the decedent during his lifetime because of the existence of a basis of jurisdiction other than mere physical presence."

---

[2] Virginia law continues to make provision for appointment of a local administrator solely for purpose of prosecution of a personal injury or wrongful death action against the estate of a nonresident decedent, where the cause of action arose in Virginia. Va. Code § 64.1-75.1. Presumably this recognizes that in many tort actions the decedent will have no connection with Virginia other than mere physical presence at the time of his death.

The Massachusetts Supreme Judicial Court has addressed an analogous situation in Saporita v. Litner. 371 Mass. 607, 358 N.E. 2d 809 (1976). In Saporita, the plaintiff sought to recover against the defendant executor on a contract for services performed for the testator in Massachusetts. The testator, however, had left no assets in Massachusetts, and the executor had been appointed by a Connecticut probate court. The executor relied on the general rule that in Massachusetts a foreign executor was not subject to suit in the state courts. Effectively rejecting the common law rule in favor of a due process analysis, the Supreme Judicial Court held that because the testator had sufficient "minimum contacts" with Massachusetts to permit the exercise of personal jurisdiction under International Shoe, there

existed "no sound reason why the general rule granting immunity to foreign executors should shield the defendant from suit in Massachusetts, where the parties lived and worked, where they made the contract, where they intended the contract to be performed, and where the plaintiff had carried out her part of the contract," 358 N.E.2d at 816, absent any showing that the exercise of jurisdiction would unduly interfere with proceedings in the Connecticut probate court.[3] See also Eubank Heights Apartments, Inc. v. Lebow. 615 F.2d 571 (1st Cir. 1980), finding under the authority of Saporita that a Texas state court could obtain jurisdiction under the Texas long-arm statute.

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[3] The Massachusetts long-arm statute, like Virginia's, is generally applicable to executors, administrators or other personal representatives. Mass. Gen. Laws Ann., ch. 223A, § 1. See Saporita, 358 N.E.2d at 814-15 n.5.

over a Massachusetts executrix, despite the absence of any assets in Texas.

Accordingly, we hold that personal jurisdiction was properly obtained over defendant, a Florida executor, under the Virginia long-arm statute, notwithstanding the absence of any assets of the decedent's estate in Virginia. We next consider the effect of the Florida nonclaim statute. [4]

III.

Fla. Stat. Ann. § 733.702 provides in relevant part:

> "(1) No claim or demand against the decedent's estate, that arose before the death of the decedent . . . shall be binding on the estate, on the personal representative, or any beneficiary, unless presented:

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[4] In Saporita, the executor also attempted to defend on the basis of the Connecticut nonclaim statute, Conn. Gen. Stat. § 45-205, but the court ruled that the issue was not properly before it, because the statute had not been pleaded below. 358 N.E.2d at 816.

"(a) Within three months from the time of the first publication of the notice of administration, even though the personal representative has recognized the claim or demand by paying a part of it, or interest on it, or otherwise . . . ."

A claim is presented by filing a written statement with the clerk of the Probate Court in the county in which the executor qualified. Fla. Stat. Ann. § 733.703. Filing of a suit against the executor does not satisfy the presentment requirement of the nonclaim statute. See A. R. Douglass Inc. v. McRainey. 102 Fla. 1141, 137 So 157, 159 (1931).[5]

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[5] Following McRainey, the Florida legislature amended the nonclaim statute in 1945 to permit the filing of a lawsuit against a decedent's personal representative to act as a substitute for filing a claim in the appropriate probate court. Fla. Stat. Ann. § 733.16(1)(a). See Wimpfheimer v. Goldsmith, 298 A.2d 778, 781 (Del. Ch. 1972); McCord v. Smith, 43 So2d 704, 707 (Fla. 1949). In 1976, the Florida legislature amended and recodified the nonclaim statute as the present Fla. Stat. Ann. § 733.702, omitting this

The Florida courts have consistently held that the nonclaim statute is applicable against nonresident claimants as well as residents. McCord v. Smith, 43 So2d 704, 707 (Fla. 1949); Brooks v. Federal Land Bank of Columbia. 106 Fla. 412, 143 So. 749, 752 (1932). The "cardinal purpose of the statute . . . is to facilitate an orderly and expeditious settlement of estates," McCord, 43 So2d at 708, a purpose which could hardly be served if claims in other states were

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exception to the presentment requirement. Under established principles of statutory interpretation, it is presumed that the legislature was familiar with the existing law and judicial construction of former law when it amended the nonclaim statute, see Williams v. Jones, 326 So,2d 425, 435 (Fla. 1975), appeal dismissed, 429 U.S. 803 (1976), and that where the legislature amended a statute by omitting words, it intended the statute to have a different meaning from that previously accorded. See Capella v. City of Gainesville. 377 So2d 658, 660 (Fla. 1979).

allowed to go unadjudicated for years, postponing conclusion of the administration of the estate indefinitely. See Brooks, 143 So. at 753. Although the nonclaim statute bears some similarity to a statute of limitations, in that it prevents the "enforcement of stale demands," McCord, 43 So.2d at 708, it is "not wholly such," Brooks, 143 So. at 753. Florida's statute has been described by one court as substantive rather than procedural, Wimpfheimer v. Goldsmith, 298 A.2d 778, 780 (Del. Ch. 1972), and there is authority for the view that nonclaim statutes are jurisdictional, so that unless complied with, a claim against the estate cannot be allowed. 31 Am. Jur. 2d Executors and Administrators § 291 (1967). See also 34 C.J.S. Executors and Administrators § 422 (1942).

Plaintiff asserts that the nonclaim statute cannot bar his claim from being

heard in a federal district court in Virginia, and that the longer Virginia statute of limitations allowing five years for suit on a written contract and three years on an oral contract, Va. Code § 8.01-246,[6] is applicable rather than the nonclaim statute. Virginia allows suit to be brought against a personal representative for any contract with his decedent, Va. Code § 64.1-144, and although Virginia has a procedure for presentation of creditors' claims against an estate being administered in Virginia, Va. Code § 64.1-171, Virginia apparently has no nonclaim statute comparable to Florida's.

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[6] Although it is not entirely clear from the record whether the contract between plaintiff and Via was oral or written, the district court found that certain documents exchanged by the parties to the contract overcame a statute of frauds challenge, and that ruling is not appealed.

As our subject matter jurisdiction in this case rests on diversity of citizenship, we are required to give effect to an applicable state statute limiting the period within which recovery may be had, Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945), and we must follow the conflict of laws rules of the forum state, Virginia. Klaxon Co. v. Stentor Co., 313 U.S. 487, 496 (1941). The issue before us presents a conflict between not merely two limitations periods, between the functions of bodies of law, that of contracts and that of estate administration.

There is no question that, had this suit been brought while Via was alive, the law of Virginia would have governed. Virginia has long adhered to the traditional conflicts principle that the "nature, validity and interpretation of

contracts are governed by the law of the place where made, unless the contrary appears to be the express intention of the parties." Woodson v. Celina Mutual Insurance Co., 211 Va. 423, 177 S.E. 2d 610, 613 (1970), quoting C.I.T. Corp. v. Guy, 170 Va. 16, 195 S.E. 659, 661 (1938). Accord, Poole v. Perkins, 126 Va. 331, 101 S.E. 240, 241 (1919). As this suit can be seeking no more than to establish the rights of plaintiff under the contract, the federal courts having no probate jurisdiction, Markham v. Allen, 326 U.S. 490, 494 (1946), Byers v. McAuley, 149 U.S. 608, 619 (1893), Virginia law would still apply, including the relevant statute of limitations for suit on a contract, even though the suit is now against the executor. As we have discussed above, it is generally accepted that an action may be brought against a

foreign executor if authorized by state law and jurisdiction would have existed to bring suit against the decedent in his lifetime. Restatement § 358 and comment d.

Our finding that the Virginia statute of limitations governs this action, however, does not end our inquiry. We have held that the traditional rule permitting suit against foreign executors only where assets are found in the forum state has been superseded with respect to personal jurisdiction; it remains true, nonetheless, that a judgment against a foreign executor is only effective of its own force "so far as it creates a claim against things belonging to the decendent which are situated in the state." Restatement § 358 comment c, and no assets are found in Virginia against which the judgment might be enforced.

The federal courts in Virginia have no jurisdiction over the res of Via's estate, located entirely in Florida, and defendant executor is subject to suit only in his representative capacity; thus, the district court's judgment for plaintiff cannot enable recovery in itself. Though a judgment entered in Virginia would not be subject to challenge on the merits in Florida, under the full faith and credit requirement of the federal Constitution, Art. IV, § 1, see Markham, 326 U.S. at 494, McCord. 43 So.2d at 708, the claim would nevertheless have to be enforced in separate Florida administration proceedings, in common with all claims general creditors, as stated in Restatement § 358 comment d. Since the Florida courts are required to enforce their state's nonclaim statute against nonresidents, under controlling

decisions of the state Supreme Court, satisfaction of plaintiff's claim is impossible regardless of its merits, leaving the district court's judgment a practical nullity. It is settled law that enforceability and the effect to be given a judgment against a nonresident executor must be determined by the courts of the state where probate proceedings are pending. Brooks v. National Bank of Topeka. 251 F.2d 37, 42 (8th Cir. 1958). See Security Trust Co. v. Black River National Bank, 187 U.S. 211, 227 (1902); Byers, 149 U.S. at 620; Yonley v. Lavender, 88 U.S. (21 Wall.) 276, 279 (1894). A federal court has power to entertain suits by creditors of an estate to establish their claims, but only to the extent that this does not "interfere with the probate proceedings or assume general jurisdiction of the probate or

control of the property in the custody of the state court." Markham, 326 U.S. at 494.

We think that the unusual circumstances of this case merit application of the principle that a court "will not exercise judicial jurisdiction if it cannot provide appropriate relief." Restatement § 85. Although courts have often allowed suits to be brought against executors notwithstanding the bar of a nonclaim statute in another state, such cases have typically involved claims which might be satisfied through insurance, see, e.g. Propst v. Fisher, 313 F.2d 248 (6th Cir. 1963); Brooks, 251 F. at 37, or through assets located in the forum state, Owens v. Estate of Saville, 409 S.W.2d 660 (Mo. 1966), so that the probate jurisdiction of the other state would not necessarily be

disturbed. Cf. Swan v. Estate of Monette, 400 F.2d 274, 277 (Lay, J., concurring) (8th Cir. 1968) (denying claim barred by nonclaim statute of forum state). We are not granting the Florida statute any extraterritorial application in Virginia, but only recognizing the effect that statute will have on enforcement of this claim. It would be futile to allow plaintiffs to take claims such as this against a nonresident executor to trial on the merits and judgment, where satisfaction of the judgment could only be had from an estate which cannot be reached due to the bar of a nonclaim statute in the state with probate jurisdiction. In such circumstances, the district court's judgment becomes no more than an advisory opinion, possibly affording some moral vindication to the plaintiff but nothing else, and

threatening to needlessly deter a prudent executor from final disposition of the estate. Subject matter and personal jurisdiction are not wanting, but the federal courts in Virginia are nonetheless powerless to aid plaintiff, given the situs of the entire estate in Florida and the Florida law as conclusively determined by the state's highest court. We hold that once defendant specifically raised the bar of the Florida nonclaim statute,[7] and established that all the assets of the estate were within the exclusive probate jurisdiction of the

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[7] We perceive no basis for plaintiff's contention that defendant waived the nonclaim statute by failing to plead it specifically in his answer as a defense. At the time defendant filed his answer, the three-month period of the nonclaim statute had not yet run, and the statute thus afforded no defense; therefore, it could hardly have been pleaded.

Florida courts, the district court should have declined jurisdiction.[8]

IV.

We do not agree with the district court that defendant would be estopped from raising the defense of the nonclaim statute in the Florida courts. Defendant, it is true, did not specifically raise the defense until after the three-month filing period had passed, but that is the only resemblance this case bears to Davis v. Evans. 132 So.2d 476 (Fla. Dist. Ct. App. 1961), on which plaintiff

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[8] Given our disposition of this issue, we do not reach the question stressed by the district court of whether the Florida nonclaim statute is to be treated as going only to the remedy or to the right to recover, under Norman v. Baldsin, 152 Va. 800, 148 S.E. 831 (1929). This matter would only arise if Florida, rather than Virginia, were the state of the "otherwise applicable" substantive law, Restatement § 143, which we have found not to be the case.

relies. In Davis, a negligence action was brought against the decedent a month before his death. The Florida nonclaim statute then in effect gave creditors eight months from the date of the publication of notice of administration to present their claims, and the requirement was not satisfied by the pendency of a suit against the decedent at the time of his death. The same attorneys represented the decedent and his executor, and they allowed transactions to be carried on between the parties during the eight-month period in the decedent's name, never informing the plaintiff that their client had died. Only after the eight-month period had run did the attorneys give notice of the death, and raise the nonclaim statute as a bar. The court held that, assuming the plaintiff had no knowledge of the death and that the exe-

cutor had knowledge of the pending suit as the plaintiff averred, the executor would be estopped from raising the nonclaim statute as a matter of law. 132 So.2d at 482.

The crucial distinction between this case and Davis is that here, plaintiff knew that Via had died when he filed his suit, as he named the executor as defendant in his complaint.

Accordingly, we reverse the judgment of the district court and remand for entry of judgment for defendant.[9]

REVERSED AND REMANDED WITH DIRECTIONS.

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[9] As our decision is predicated on the factual assumption that the entire estate is, as alleged by defendant, within Florida, plaintiff is not prejudiced against having his judgment reinstated should any assets actually be discovered outside the jurisdiction of the Florida courts from which the judgment might be satisfied.

APPENDIX B

Clerk's Office U.S. Dist. Court
At ROANOKE, VA.
FILED
Sep 27 1983
Joyce F. Witt, Clerk
By: /s/ D. Johns
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

CHARLES W. CROSSON, JR., Plaintiff	)	
	)	Civil Action No. 82-0462-R
v.	)	
WENDELL F. CONLEE, Executor of the Estate of E. Douglas Via. deceased, Defendant	)	ORDER

For the reasons stated in a Memorandum Opinion filed this day, it is ADJUDCED and ORDERED that Defendant's Motion for Judgment Notwithstanding the verdict shall be and hereby is DENIED.

It is FURTHER ORDERED that judgment be entered on the verdict in favor of Plaintiff in the amount of $20,296.46 plus interest at the Virginia judgment rate of 12% running from February 25, 1983, the date the verdict was decided, and the Plaintiff's taxable costs.

The Clerk is directed to strike this case from the active docket of this Court and to send certified copies of this Order to all counsel of record.

ENTER this 27th day of September

/s/ Jackson L. Kiser
United States District Court

A TRUE COPY, TESTE:

Joyce F. Witt, Clerk
By: /s/ E. Holland
Deputy Clerk

Clerk's Office U.S. Dist. Court
At ROANOKE, VA.
FILED
Sep 27 1983
Joyce F. Witt, Clerk
By: /s/ D. Johns
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

CHARLES W. CROSSON, JR., Plaintiff	Civil Action No. 82-0462-R
v.	MEMORANDUM OPINION
WENDELL F. CONLEE, Executor of the Estate of E. Douglas Via, deceased, Defendant	

This matter is before the Court on the Motion for Judgment Notwithstanding the Verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure brought by Defendant Wendell F. Conlee, Executor of the Estate of E. Douglas Via, deceased.

The question presented in this case is whether Plaintiff Charles W. Crosson, Jr.'s claim against decedent's estate is barred by Fla. Stat. Ann. § 733.70 which provides for no claim against an estate unless presented within three (3) months of the first publication of the notice of administra-tion. This issue having been thoroughly briefed and argued by counsel, I now DENY Defendant's Motion for Judgment Notwith-standing the Verdict and ENTER judgment on the verdict.

I.

At the outset, I address the conflicts of law issue of whether the Florida non-claim statute governs claim against decedent's estate. In a diversity case such as this, it is well-established that a federal district court applies the substantive law of the forum state, Erie Railway Company v. Tompkins,

304 U.S. 64 (1938), including its conflicts of law rules, Klaxon Co. ov Stentor Electric Manufacturing Co., Inc., 313 U.S. 487 (1941), and statutes of limitations. Guaranty Trust Co. of New York v. York. 326 U.S. 99 (1945).

Under recognized conflicts analysis, the federal court sitting in Virginia determines whether, according to Virginia conflict of law rules, a foreign statute such as the Florida non-claim provision is classified as procedural or substantive law. As a general rule in Virginia, foreign statutes of limitations are considered merely procedural. For this reason, the Virginia, not the foreign statute of limitations is usually applied. Norman v. Baldwin. 152 Va. 800, 148 S.E. 831 (1929).

On the other hand, Virginia also recognizes an exception to this general

rule when a right of action which did not exist at common law is both given and expressly limited by a foreign statute. Norman v. Baldwin. 148 S.E. at 833-834. There, a receiver of an insolvent North Carolina bank sued to recover excess individual liability from one of the bank's Virginia stockholders. The applicable North Carolina statute authorized a receiver to sue stockholders within or without the state to the extent of the par value of their stock. That same statute went on to provide that such actions must be brought within 10 years after an assessment on the stock.

In reversing the lower court's dismissal of the action, the Supreme Court of Virginia reasoned that since the foreign statute prescribed what right was created, provided the remedy for its enforcement, and limited the duration of

the statutory right, North Carolina's, not Virginia's, statute of limitations would govern the Virginia proceeding.

Thus, in light of Norman, the determinative question here becomes whether the Florida statute in controversy is to be treated as a general statute of limitations superseded by Virginia law or a special statute of limitation which controls regardless of the applicable Virginia rule. In my opinion, the Florida three month non-claim statute is merely a general statute of limitations. As I see it, in order for the Florida statute to fall within the exception recognized by the Norman court. it must expressly create and then limit a cause of action much like the situation with a wrongful death statute. In contrast, since the Florida provision merely modifies an existing right of action against

an estate recognized at common law, this non-claim statute must be regarded as procedural and accordingly held to be inapplicable as a bar to Plaintiff's claim.

II.

Moreover, even if the Florida non-claim statute was held to be applicable to Plaintiff's claim against decedent's estate, Defendant would be barred from raising this defense on a substantive waiver/estoppel theory.

The pertinent chronology of events is as follows:

May 5, 1982 - Death of E. Douglas Via

May 31, 1982 - First Publication of Notice of Administration

July 2, 1982 - Complaint filed in instant case

July 9, 1982 - Service of process on Defendant

July 29, 1982- Motion to Dismiss and Answer filed by Defendant

Aug. 31, 1982- 3 months period from publication of notice of administration and final date to file claim against estate expires

Dec. 6, 1982 - Defendant first raises issue of Plaintiff's failure to timely comply with three-month provision of Fla. Stat. Ann. § 733.702

Defendant executor had knowledge of the filing of this suit for over 1-1/2

months before the expiration of the three-month period. Defendant, an attorney who in all probability knew of both the specific requirements of this Florida non-claim provision and the fact that Plaintiff's Virginia attorney had not properly complied with the statute, passively let that three-month period run without objecting.[1] It was not until almost 5 months later, on December 6, 1982, that the issue of non-compliance with the non-claim provision was first raised.

Under Florida case law, Defendant's conduct in this regard would serve as a basis for estopping him from raising § 733.702 as a possible defense to Plaintiff's claim. For example, in Davis v. Evans, 132 S.2d 476 (Fla. Dist. Ct. App. 1961), a case cited by Plaintiff in his brief, a negligence

action was brought against Defendant's one month before the date of his death. The applicable nonclaim statute then operated as a bar to any claim against the estate not filed within 8 months of the first notice to creditors. Defendant's attorneys concealed the fact of decedent's death, continuing to treat the action as if decedent was still alive up until the expiration of the 8 months. It was only then that Defendant raised for the first time the defense that the non-claim provision had not been properly followed. Due to Plaintiff's failure to inform Plaintiff of the death of decedent and her corresponding failure to timely file a claim against the estate, the Davis court reversed the lower court's entering of summary judgment for defendant and remanded the case with directions to permit Plaintiff to plead the

affirmative defense of estoppel. See also State Bank of Orlando & Trust Co. v. Macy, 101 Fla. 140. 133 So. 876 (1931) [administrator's payment of interest on mortgage given by decedent, where payments were made during the proscribed one-year period from first notice to creditors, constitutes waiver of failure of mortgagee to timely file claim]. Although the facts of the instant case are not as egregious as those in Davis and Macy, I feel that Defendant's conduct of (1) letting the 1-1/2 months of the non-claim period remaining after the filing of this suit elapse and (2) waiting almost 5 months after expiration of the 3 month period before raising this issue for the first time, would, under applicable Florida case law, justify barring Defendant's raising of the Florida statute as a defense here.

In sum, I feel that under established conflicts analysis, the Florida non-claim statute being a procedural statute, is inapplicable as a bar to Plaintiff's claim. Furthermore, Defendant's failure to timely raise the non-compliance of the 3 month non-claim statute would, under applicable principles of Florida waiver/estoppel law, act to prohibit Defendant from using this as a defense.

Accordingly, Defendant's Motion for Judgment Notwithstanding the Verdict is hereby DENIED and judgment is ENTERED on the verdict.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

/s/ Jackson L. Kiser
United States District Judge

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[1] Defendant did generally plead the statute of limitations in his answer, but did not specifically raise the applicability of the Florida non-claim statute until December 6, 1983.

A TRUE COPY, TESTEE:

Joyce F. Witt, Clerk

By /s/ E. Holland
Deputy Clerk

APPENDIX C

FILED

NOV 8 1984

U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-2035

Charles W. Crosson, Jr.,

Appellee,

versus

Wendell F. Conlee, etc.,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Chapman and Judge Haynsworth.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX D

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF SARASOTA

Before me, the undersigned Notary Public, personally appeared WENDELL F. CONLEE, who, being by me first duly sworn, deposes and says on oath as follows:

1. That he is the duly qualified and acting personal representative of the estate of Douglas Via, A/K/A Edwin D. Via, deceased, being Estate No. 82-920 in the Probate Division of the Circuit Court in and for Sarasota County, Florida.

2. That he is a member of The Florida Bar practicing law in Sarasota, Florida.

3. That Section 733.702. Florida Statutes 1982, provides as follows:

a. No claim or demand against the decedent's estate, that arose before the death of the decedent, shall be binding on the estate unless a claim therefor is filed in the Probate Court within three months from the time of the first publication of the notice of administration.

b. No cause of action shall survive the death of a person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed in the Probate Court within three months from the time of the first publication of the notice of administration.

4. That the first publication of the notice of administration in said estate occurred on May 31, 1982.

5. That the only claim or demand filed in said estate in the Probate Court within three months from the time of the first publication of the notice of administration was Toale Brothers Funeral Home in the amount of $813.04.

6. That Charles W. Crosson filed no claim or demand in said estate in the Probate Court within three months from the time of the first publication of the notice of administration.

/s/ Wendell F. Conlee
Wendell F. Conlee

Sworn to and subscribed before me this 26th day of October, 1982.

/s/ Irene C. Prince
Notary Public

My Commission Expires: 10/28/85